

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

**WSOU INVESTMENTS, LLC d/b/a
BRAZOS LICENSING AND
DEVELOPMENT,**

Plaintiff,

v.

**DELL TECHNOLOGIES INC.,
DELL INC., EMC CORPORATION,
AND VMWARE, INC.,**

Defendants.

**Civil Action No.: 6:20-cv-00480-ADA-DTG
Civil Action No.: 6:20-cv-00481-ADA-DTG
Civil Action No.: 6:20-cv-00486-ADA-DTG**

JURY TRIAL DEMANDED

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**PLAINTIFF’S OBJECTIONS TO AND APPEAL FROM MAGISTRATE
JUDGE’S REPORT AND RECOMMENDATION GRANTING IN PART
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT OF
NON-INFRINGEMENT OF U.S. PATENT 9,164,800**

Plaintiff respectfully objects to and appeals Magistrate Judge Gilliland’s Report and Recommendation (“R&R”) denying Plaintiff’s Motion to Strike Certain Portions of Defendants’ Expert Reports and Rule 26(a)(2)(C) Disclosure (the “Motion”), as Magistrate Judge Gilliland incorrectly found that Brazos was put on sufficient notice regarding vSphere 5.0, that the case law supported Defendants’ theory on the use of prior art, and that certain witnesses should be allowed to testify. *See, e.g., Baylor Health Care Sys. v. Equitable Plan Servs.*, 955 F. Supp. 2d 678, 689 (N.D. Tex. 2013); *see also* Fed. R. Civ. P. 72(a) (“The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.”).

A. Defendants Did Not Provide Sufficient Notice for vSphere 5.0

The R&R is incorrect, as Defendants themselves admitted [REDACTED]

[REDACTED] Defendants’

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[REDACTED]

[REDACTED]

[REDACTED] Defendants had over 17 months to prepare and serve their invalidity chart and failed to do so—even though they were required to make the chart by Court order.

Further, contrary to Defendants’ assertion, Defendants’ experts [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Additionally, Brazos was not required, as Defendants suggest, to review [REDACTED]

[REDACTED] Indeed,

[REDACTED]

[REDACTED] Defendants violated the Court’s OGP, and Defendants’ excuse is insufficient because [REDACTED]

[REDACTED]

[REDACTED]¹

¹ Contrary to Defendants’ contention, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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B. Defendants' Experts' Opinions on Unelected Prior Art Should be Excluded

Defendants agreed to

[REDACTED] Defendants

now argue that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Accordingly,

the Court should preclude Defendants' experts from

² In Brazos's Reply to Defendants' Opposition to Plaintiff's Motion to Strike Certain Portions of Defendants' Expert Reports and Rule 26(a)(2)(C) Disclosure, Brazos [REDACTED]

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C. Defendants Should Not Be Permitted to Call Messrs. Colbert As Witnesses, Nor Should Mssrs Colbert, Connors and Turner be Permitted to Testify as Experts, and Defendants’ Rule 26(a)(2)(C) Should Be Stricken

Defendants failed to disclose Mr. Colbert in their Initial Disclosures before the December 2021 deadline.³ *See* Case No. -480, Dkt. No. 125 at 3. Defendants attempt to excuse their violation by arguing that [REDACTED]

[REDACTED] But the Scheduling Order includes no such limitations. Brazos’s reliance on the Scheduling Order should not be penalized. *Accentra Inc. v. Staples, Inc.*, No. CV 07-5862 ABC RZX, 2010 WL 8450890, at *7 (C.D. Cal. Sept. 22, 2010); *Agere Sys., Inc. v. Atmel Corp.*, No. 02-CV-864, 2005 WL 6728523, at *1 (E.D. Pa. Feb. 23, 2005). Defendants’ purported justification is insufficient. *Nosewicz v. Janosko*, No.16-cv-00447-PAB-KLM, 2019 WL 4248895, at *4 (D. Colo. Aug. 19, 2019).

Moreover, to the extent that Defendants seek to offer [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Defendants’ Rule 26(a)(2)(C) makes clear that [REDACTED]

[REDACTED]

[REDACTED] Indeed, Defendants do not deny [REDACTED]

[REDACTED]

[REDACTED]

³ In a January 31, 2023 email, Defendants’ counsel stated Defendants would not be bringing Dr. Varghese to trial, and he is no longer a witness. *See* Ex. 1.

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[REDACTED] This is nothing more than trial by ambush, which is exactly the type of conduct that Rule 26 was intended to prevent. *Avnet, Inc.* v. *Motio, Inc.*, No. 12 CV 2100, 2016 WL 927194, at *4-5 (N.D. Ill. Mar. 4, 2016).

For these reasons, Plaintiff respectfully requests that this Court sustain Plaintiff's objections and vacate Magistrate Judge Gilliland's Report and Recommendation denying Plaintiff's Motion to Strike Certain Portions of Defendants' Expert reports and Rule 26(a)(2)(C) Disclosure.

Dated: February 13, 2023

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served or delivered electronically via email to all counsel of record, on this 13th day of February, 2023.

/s/ Jonathan K. Waldrop
Jonathan K. Waldrop